EDITOR'S NOTE

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No. 87-5677

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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UNITED STATES OF AMERICA Ex Rel.

WARREN LEE HARRIS,

Petitioner,

-vs-

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. THERE IS A DIRECT CONFLICT BETWEEN THE FIFTH AND TENTH CIRCUITS, ON THE ONE HAND, AND THE THIRD AND THE SEVENTH CIRCUITS ON THE OTHER, AS TO WHEN HABEAS REVIEW SHOULD BE ALLOWED WHEN A STATE COURT HAS ADDRESSED BOTH THE PETITIONER'S PROCEDURAL DEFAULT AND THE MERITS OF HIS CLAIM.

2. DOES WAINWRIGHT V. SYKES REQUIRE THAT A HABEAS PETITIONER BE GIVEN AT LEAST ONE OPPORTUNITY TO SHOW "CAUSE" AND "PREJUDICE" IN THE EVENT OF A PROCEDURAL DEFAULT?

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Appendix A

Court of Appeals' Decision Below: Harris v. Reed, 822 F.2d 684 (7th Cir. 1987)

Appendix B

Unpublished Opinion of the Illinois Appellate Court: People v. Harris, No. 81-871 Dated February 22, 1983.

Appendix C

Opinion of District Court Allowing Review On Merits of Petitioner's Claim: United States Ex Rel. Harris v. Reed, 608 F.Supp. 1369 (N.D. Ill. 1985)

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I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit holding that the Petitioner, Warren Lee Harris, waived his claim of ineffective assistance of counsel is reported at Harris v. Reed, 822 F.2d 684 (7th Cir. 1987). The contrary finding of District Court that the Petitioner did not waive his claim of ineffective assistance of counsel is reported at United States Ex Rel. Harris v. Reed, 608 F.Supp. 1369 (N.D. Ill. 1985). Copies of both these decisions are attached as Appendices A and C.

II. STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 2101(c). The Petitioner seeks review of the decision of the United States Court of Appeals issued on June 12, 1987. A Petition for Rehearing with Suggestion for Rehearing on Enbanc was timely filed on June 26, 1987. The Petition for Rehearing was denied on July 20, 1987. This Petition is filed within 90 days of the denial of the Petition for Rehearing.

III. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution:

In all criminal prosecutions an accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance Of Counsel for his defense. [emphasis added].

IV. STATEMENT OF THE CASE

A. The Trial of Warren Harris

In December 1977 the Petitioner, Warren Lee Harris ("Harris"), was tried in the Circuit Court of Cook County, Illinois for murder. A public defender was assigned to represent him. At trial, the public defender told the jury in her opening statement that there were two witnesses who saw another man flee the scene of the crime and that these two persons separately identified this man in a lineup as the person they saw running away from the shooting. (Petitioner's Exhibit 1, pp. 32-33)

The defense presented no witnesses and offered no evidence supporting the theory presented in the opening statement. The entire trial, from opening statements to closing argument, comprises only 130 pages of double-spaced transcript. (Petitioner's Exhibit 1, pages 25-154) Harris was convicted of murder and later sentenced to 50 to 100 years in prison.

B. Post Conviction Review in the State Courts

Harris' conviction was upheld on direct appeal against a challenge to the sufficiency of the evidence. Harris then filed a Petition for Post-Conviction Relief alleging ineffective assistance of trial counsel for, among other things, the public defender's failure to present the two witnesses who separately identified another man fleeing the scene. This issue had not been raised on direct appeal. The state trial court denied this Petition for Post Conviction Relief.

On appeal, the Illinois Appellate Court affirmed in an unpublished opinion (attached as Appendix B). This opinion first notes Harris' "procedural default" in failing to raise his ineffective assistance claim on direct appeal, (p. 5). Yet the opinion then also goes on to discuss and resolve the merits of this claim. (pp. 5-7)

C. Federal Habeas Review

Harris filed a pro se petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois claiming he had been denied effective assistance of counsel. The State moved to dismiss the petition on the grounds that Harris had failed to present the ineffective assistance claim on direct appeal and therefore had waived the claim. In a published opinion, the District Court found that the Illinois Appellate Court had excused the procedural default by addressing the merits of Harris' ineffective assistance claim. United States Ex Rel. Harris v. Reed, 608 F.Supp. 1369, 1376-78 (N.D. Ill. 1985) (attached as Appendix C).

Finding that the procedural default had been waived by the state court, the District Court then set the matter for trial on the merits of Harris' claim. The undersigned was then appointed to represent him. A three-day trial was held in November of 1985. The district court issued a 29-page Findings of Fact and Conclusions of Law and found that the case was "very close", but ultimately denied Harris' claim on the merits.

On appeal to the United States Court of Appeal for the Seventh Circuit, the State once again argued that as a threshold

matter, the district court erred in finding the state court waived Harris' procedural default. The majority of the panel agreed. The majority reviewed the unpublished opinion of the Illinois Appellate Court and found:

> [T]here is neither an explicit finding of waiver nor an express intention to ignore waiver. The order is ambiguous because the Court addressed the merits of some of the Petitioner's claims which he clearly implied had been waived.

822 F.2d at 687

The majority then attempted to ascertain the intent of the Illinois Appellate Court. It concluded that a "full reading of the order suggests to us that the Appellate Court intended to find all grounds waived except that pertaining to alibi witnesses". Ibid. at 687. Accordingly, the majority held it could not review the merits of Harris' ineffective assistance claim.

In a concurring opinion, Judge Cudahy disagreed with the majority's treatment of the waiver issue as follows:

> As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived, the Illinois court considered the claim on the merits. Rather than attempting to divine the unspoken "intent" of the [Illinois Appellate Court], I think we should invoke a presumption that waiver not clearly found has been condoned. Waiver, particularly of an ineffective assistance claim on direct appeal, is essentially a technical ground for avoiding very difficult, very important and very close issues on the merits. Certainly it is within the State Court's power to protect their procedural requirements merely by expressing findings that a petitioner has waived.

Id. at 687. [Emphasis added] Judge Cudahy went on to find that though the matter was "very close", he agreed with the district court on the merits. Id.

V. ARGUMENT - REASONS FOR ALLOWING THE WRIT

A. There Is a Conflict Among The Circuits As To When To Allow Habeas Review Where A State Court Opinion Has Discussed Both A Procedural Default And The Merits

1. The Fifth and Tenth Circuits Look to Whether the Procedural Default Was "Relied on Exclusively"; In Contrast, The Third and Seventh Look Only To Whether the Procedural Default was an "Alternate Ground"

In Strickland v. Washington, 466, U.S. 668 (1984) this Court restated the well-established principle that the "right to counsel is the right to effective assistance of counsel." 466 U.S. at 686. Here, where the petitioner's public defender told the jury in opening statement of two witnesses who separately identified another man fleeing the scene but then presented no evidence, there is an obvious question as to whether the petitioner was denied this fundamental constitutional right.

In Wainwright v. Sykes, 433 U.S. 72, 81-83 (1977) this Court held that where there is "an adequate state ground", that is, a procedural default under state law, then a federal court should decline to consider a habeas petitioner's claim. This rule is not jurisdictional, but is grounded on considerations of comity with state courts and the promotion of finality. See Reed v. Ross, 468 U.S. 1, 10 (1984) Thus, if the state court does not rely upon or waives a procedural default and goes on to reach the merits, then a federal court may properly review the merits without offending the principles underlying Sykes, since the court has not applied the procedural default and has itself considered the merits. See County of Ulster v. Allen, 442 U.S. 140, 154 (1979)

At issue here is the situation where a state court affirms a conviction, and in so doing, addresses both the procedural default and the merits. The Fifth and the Tenth Circuits take one approach, namely, that if the state court does not rely "exclusively" on the procedural default, then habeas review is proper. In other words, if the state court reaches the merits, then so can the federal habeas court. The Third and the Seventh Circuits hold quite the contrary; where the state court addresses both the procedural default and the merits, then so long as the default was an alternate ground, habeas review should be denied.

The Fifth and Tenth Circuits' position is exemplified in Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981) In Thompson the Fifth Circuit found that the state court had addressed both a procedural default and the merits, but, "[b]ecause the state courts have not relied exclusively upon [the petitioner's] procedural default, Wainwright v. Sykes does not prevent federal habeas review". 642 F.2d at 998. [Emphasis added] Hence, when the state court addresses the merits, the door is opened to habeas review even if the procedural default has also been addressed.

This "exclusive reliance" rule of Thompson has most recently been followed by the Tenth Circuit in Braiser v. Douglas, 815 F.2d 64 (10th Cir. 1987). In Braiser, as in this case, the state appellate court relied upon both the petitioner's procedural default and the merits in denying post-conviction relief. Following Thompson, the Tenth Circuit held that federal habeas review of the petitioner's claim was proper:

> We conclude that since the state court reviewed petitioner's claims on the merits, the procedural de-

fault did not preclude the federal habeas court from addressing the claims on the merits. See Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981) (When "the state courts have not relied exclusively upon [petitioner's] procedural default, Wainwright v. Sykes does not prevent federal habeas review."

815 F.2d at 65.

This "exclusive reliance" rule has not been universally accepted. In fact, the Third Circuit has expressly rejected the Thompson decision. In Caruso v. Zelinsky, 689 F.2d 435, 439-40 (3rd Cir. 1982) the court reviewed three different approaches other circuits have taken when a state court addresses both a procedural default and the merits, including the Thompson decision. The court then held that exclusive reliance on the procedural default was not necessary to prevent habeas review; it need only be an "alternative holding":

> Because we believe that the policies that justify deference to a valid state procedural rule at all are equally applicable whenever the state court actually relies on a procedural bar, we conclude that state court reliance on a procedural rule as an alternate holding suffices to implicate the procedural default doctrine.

689 F.2d at 440. [Emphasis added]

The Seventh Circuit follows this rule that the procedural default need only be an "alternate holding" in order to preclude habeas review. In this case, it relied upon the rule in order to bar review of the merits of petitioner's ineffective assistance claim:

> The [state appellate] court then proceeded, as an alternate holding, to reject Harris' claim on its merits. Under these circumstances, we find that the order was closer to that in Farmer, when the state court relied on the alternate grounds for its findings.

822 F.2d at 687.

2. Where the State Court Is Unclear as to Whether It Excused a Procedural Default, There Is A Further Split of Authority as to How That Ambiguity Should Be Resolved

Not only is there a conflict among circuits as to whether the procedural default need be relied on "exclusively", there is also a split among the circuits as to how to treat a state court opinion which is ambiguous as to whether it "waived" the procedural default.

In this case, the majority opinion has taken the position that it is entitled to discern what the ambiguous state court opinion meant, in particular, whether or not the opinion "suggests" that the procedural default was waived or excused. 822 F.2d at 687. Such an attempt to second-guess the intent of the state court in order to determine whether to allow habeas review is wholly at odds with the precedent of this Court and other circuits.

This Court has long held that "courts indulge every reasonable presumption against the waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) See also Brewer v. Williams, 430 U.S. 387, 440 (1977); Brookhart v. Janis, 384 U.S. 1, 4 (1966).

So too, other circuits have employed a presumption against waiver of constitutional claims when raised in a habeas petition. In Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), vacated on other grounds, 463 U.S. 1223 (1983) the court considered whether the habeas petitioner's claim was preserved in an

ambiguous state court opinion and presumed that the state court reached the merits:

> In the situation presented here, where the state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits....
>
> Otherwise, federal habeas review would unjustly be denied a prisoner who had no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Issacs [Engle v. Issac, 456 U.S. 107(1982)], for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

686 F.2d at 314, and n. 4.

Similarly, the Second Circuit in Rosenfeld v. Durham, 820 F.2d 52 (2nd Cir. 1987), reversed the district court for presuming that the state court opinion was based on a procedural default:

> [The] district court was not entitled to assume that the state court's decision rested on a procedural default. In fact, that court's language -- "they do not merit", while ambiguous, suggests that it went beyond the petitioner's procedural default and considered the merits of his claim.

820 F.2d at 55. Judge Cudahy set forth the same principle in his concurring opinion here: "Rather than attempting to divine the unspoken intent of the [Illinois Appellate] Court, I think we should invoke a presumption that waiver not clearly found has been condoned." 822 F.2d at 687.

The conflicts described above affect not just Warren Harris, but every habeas petitioner in the nation. State court opinions which affirm convictions with discussions of both a procedural default and the merits are common. How a federal

habeas court treats such dual-based decisions requires a uniform standard. Yet, such uniformity is plainly lacking under the current state of the law. Whether the merits of a petitioner's constitutional claim will ever be reviewed by federal habeas court should not hinge on whether he happens to be imprisoned in Illinois versus Oklahoma. Only this Court can ensure that a habeas petitioner's procedural default will be given equal treatment.

B. A Habeas Petitioner Has A Right To A Hearing On "Cause And Prejudice" Under Sykes And Such A Right Was Denied Here

Even if the state court declares a procedural default as the exclusive and unequivocal basis for its decision, Sykes still allows federal habeas review if the petitioner can show "cause" and "prejudice". 433 U.S. at 90-91. Yet here, Warren Harris never had an opportunity to prove either "cause" or "prejudice".

Warren Harris has an eighth grade education. (Tr. November 14, 1985 at 59) After filing his handwritten pro se petition, the district court found that the state court had waived any procedural default. Hence, there was no further need to show "cause" and "prejudice" and the district court proceeded with a three day trial on the merits. Now, the majority below has found the procedural default was not excused. But Harris still has never had an opportunity to show "cause" or "prejudice" for any procedural default. Harris' chance to prove the cause and prejudice exception to Sykes has simply fallen through the cracks.

The "cause and prejudice" exception is part and parcel of the protection of constitutional rights built into the principles of Sykes. Thus, a habeas petitioner must be allowed at least

one opportunity to show cause and prejudice somewhere along the way. Otherwise, the cause and prejudice exception to Sykes can be rendered meaningless, when, as in this case, a court of appeals later disagrees with the district court as to whether the procedural default was excused.

The right to a hearing on cause and prejudice is well-illustrated in Preston v. Maggio, 705 F.2d 113 (5th Cir. 1983). In Preston the court found that the state court had in fact rejected the habeas petitioner's claim on a procedural ground and therefore federal habeas review was barred unless cause and prejudice could be shown. After finding that the petitioner had not been given an adequate opportunity to show cause, the Fifth Circuit vacated and remanded the case to the district court for a hearing on cause and prejudice. 705 F. 2d at 117.

Here the decision below completely ignores the cause and prejudice exception; other than a passing reference in a footnote that Harris' counsel in the state appellate court was different from his trial counsel (822 F.2d at 686, n.1), the words "cause" and "prejudice" are not even mentioned in the majority's opinion. Such a result is wholly at odds with the principles underlying Sykes, not to mention the express holding of the Fifth Circuit in Preston.

Accordingly, the majority's opinion should, at the very least, be reversed and remanded to allow Warren Harris his one opportunity to show cause and prejudice. Yet considering Warren Harris filed his habeas petition seven years ago and that a three day trial has already been held on the merits, it would be a far

better use of judicial resources for this case to be remanded for a consideration of the merits to the Court of Appeals. See, e.g. Granberry v. Greer, ___ U.S. ___, 107 S.Ct. 1671, 1673-76 (1987) (It is appropriate to address merits of habeas claim even though state remedies not exhausted where called for by the interests of justice.)

VI. CONCLUSION

The petitioner, Warren Lee Harris, respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Grand Trunk filed a reply and sur-reply. The court granted summary judgment to Mulay on September 30, 1983.

Grand Trunk moved to vacate the summary judgment on February 17, 1984, relying principally on the deposition of NATCO's service manager, which was taken after the grant of summary judgment. In the deposition, the NATCO service manager testified that the locator dowels may have been missing from the machine when it entered Grand Trunk's control; this information provided the basis of a defense against Carmack Amendment liability.

The trial court concluded that Grand Trunk had breached "an affirmative duty to file material in opposing ... summary judgment," justifying denial of reconsideration. *Mulay Plastics, Inc. v. Grand Trunk Western Railroad Co.*, 102 F.R.D. 130, 131–32 (N.D.Ill.) (quoting *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 167 (7th Cir.1984)), *app. dism'd*, 742 F.2d 369 (7th Cir.1984), *cert. denied*, 470 U.S. 1037, 105 S.Ct. 1409, 84 L.Ed.2d 798 (1985). The court held that Grand Trunk had unreasonably, if not deliberately, failed to advance the defense earlier. Grand Trunk had notice of the basis of the defense prior even to the filing of the complaint because the NATCO service manager had suggested to Grand Trunk's damage prevention officer that the dowels might be missing and searched for the dowels with him.

But because Grand Trunk's lapse was not willful, the court did not apply the harsh sanction of refusing reconsideration. The court, invoking its equitable powers, decided for "striking a middle ground" and vacated the ruling conditioned on Grand Trunk's payment of Mulay's attorney's fees in handling the motion. The court drew an analogy to Rule 60, which permits relief from a final judgment to be granted "upon such terms as are just." The court also likened its ruling to granting voluntary dismissal under Rule 41(a)(2) upon "such terms and conditions as the court deems proper." The court drew its authority from the statement in *Hall v. Cole*, 412 U.S. 1, 4–5, 93 S.Ct. 1943, 1945–46, 36 L.Ed.2d 702 (1973), that "federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require."

The trial court could have denied reconsideration of the order granting summary judgment. Grand Trunk also had the option of not paying the fees and letting the judgment stand, an option that it understandably did not find attractive. Thus, the granting of fees here actually benefited Grand Trunk. Having so benefited below, Grand Trunk cannot further improve its position here.

V

For the reasons stated above, the judgment of the district court is

AFFIRMED.

KEY NUMBER SYSTEM

Warren Lee HARRIS, Petitioner-Appellant,

v.

Marvin REED, et al., Respondents-Appellees.

No. 86–2032.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 9, 1987.

Decided June 12, 1987.

Rehearing and Rehearing En Banc Denied July 20, 1987.

Petitioner, who was convicted of murder, brought both state and federal petitions for writ of habeas corpus, on basis of claim of ineffective assistance of trial counsel, though such claim was not presented on direct appeal. The United States District Court for the Northern District of Illinois, Eastern Division, Susan Getzendanner, J., dismissed petition on its merits, and petitioner appealed. The Court of Appeals,

Bauer, Chief Judge, held that: (1) issue which precludes state appellate court from addressing merits of claim also precludes federal court, on habeas corpus petition, from addressing merits of claim, but if state court ignores procedural default and addresses claim on merits, federal court is not precluded from reaching merits of claim in petition for habeas corpus relief, and (2) Court of Appeals could not review merits of petitioner's ineffective assistance of counsel claim, where state court did not intend to ignore petitioner's procedural default in failing to raise claim during direct appeal.

Affirmed.

Cudahy, Circuit Judge, filed concurring opinion.

1. Criminal Law ⇐998(3)

Failure to raise issue that could have been raised on direct appeal waives issue for purposes of postconviction relief.

2. Habeas Corpus ⇐45.3(1.30, 1.50)

Issue which precludes state appellate court from addressing merits of claim, also precludes federal court, on habeas corpus petition, from addressing merits; if, however, state court ignores procedural default and addresses claim on its merits, federal court is not precluded from reaching merits of claim in petition for habeas corpus relief.

3. Habeas Corpus ⇐45.3(1.40)

Federal Court of Appeals was precluded from reviewing merits of petitioner's ineffective assistance of counsel claim in his petition for habeas corpus, where state court did not ignore petitioner's procedural default in failing to raise claim on direct appeal, as full reading of state court's order suggested that appellate court intended to find all grounds waived except that pertaining to alibi witnesses, but then proceeded, as alternative holding, to reject petitioner's claim on its merits.

E. King Poor, Winston & Strawn, Chicago, Ill., for petitioner-appellant.

Jack Donatelli, Asst. Atty. Gen., Chicago, Ill., for respondents-appellees.

Before BAUER, Chief Judge, CUDAHY, and POSNER, Circuit Judges.

BAUER, Chief Judge.

Warren Lee Harris was convicted of murder in 1977 and received an indeterminate sentence of 50–100 years in prison. His conviction was upheld on appeal against a challenge to the sufficiency of the evidence. Harris filed both state and federal petitions for post-conviction relief. In his state petition for post-conviction relief, Harris alleged ineffective assistance of trial counsel. This issue had not been raised on direct appeal. Harris' state petition for post-conviction relief was denied. The Illinois Appellate Court affirmed the dismissal of Harris' petition, although it is unclear whether the dismissal was based on waiver or the weakness of Harris' claim on the merits.

In his federal petition for a writ of habeas corpus in the United States District Court, Harris again claimed ineffective assistance of trial counsel. Although the state urged that Harris' failure to present the claim on direct appeal precluded the federal court from addressing the claim, the court found that the state appellate court had excused the procedural default by addressing the merits in denying Harris' petition for post-conviction relief. *United States ex rel. Harris v. Reed*, 608 F.Supp. 1369 (N.D.Ill.1985). The district court then dismissed Harris' claim on its merits. We affirm the dismissal of Harris' petition without reaching its merits, since we conclude that the state court did not excuse the procedural default at issue.

I.

Harris was convicted of shooting Ernest "Pete" Howard on the west side of Chicago in 1977. Howard died before identifying his assailants. Harris was connected to the crime by the testimony of Antonio Slater who was driving down the block near the site of the murder. Slater testified that he heard a shot, saw Harris jump into

a car and drive away past him. At trial, Harris was represented by Assistant Public Defenders Todd Musberger and Kathryn Kuhlen. In the opening statement, the defense promised to show that two witnesses had identified a man named McWhorter leaving the scene of the crime. In fact, Alice Riles and LeRoy Carter had given statements to that effect to the police and were present, in the courtroom, prepared to testify for the defense. In the end, however, the defense presented no witnesses, resting on the belief that the state had not proven its case against Harris beyond a reasonable doubt.

Harris did not claim ineffective assistance of counsel in his direct appeal.[1] In denying the petition for post-conviction relief, the state court noted that an issue is waived for purposes of post-conviction relief if it could have been raised on direct appeal. Typically, a claim of ineffective assistance of counsel cannot be raised on direct appeal because its resolution often requires evidence which is not contained in the record on appeal. Here, however, the state court found that all of the grounds presented to support the claim of ineffective assistance of counsel were sufficiently supported by the record to have been raised on direct appeal—with the exception of the ground alleging counsels' failure to investigate and present alibi witnesses. After noting this, the court proceeded to reach and reject some of Harris' claims on the merits—claims which he could have raised on direct appeal. The United States District Court held a three-day hearing to examine Harris' claim of ineffective assistance of counsel in his petition for habeas corpus relief and determined that Harris' claim should be rejected on its merits.

II.

[1, 2] The state urges us to find that the district court erred in ruling that Harris had not waived his right to present his claim of ineffective assistance of trial counsel by failing to raise the issue on direct appeal. Failure to raise an issue that could have been raised on direct appeal waives the issue for the purposes of post-conviction review. *People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist.1979). An issue which precludes a state appellate court from addressing the merits of a claim, also precludes a federal court, on a habeas corpus petition, from addressing the merits of the claim. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354 (7th Cir.1983). If, however, the state court ignores the procedural default and addresses the claim on its merits, a federal court is not precluded from reaching the merits of the claim in a petition for habeas corpus relief. *United States ex rel. Williams v. Franzen*, 687 F.2d 944 (7th Cir.1982).

As here, the defendant in *Williams* failed to present a claim on direct appeal, first asserting it in a state petition for post-conviction relief. Without addressing waiver, the state court reached the merits of Williams' claim. On habeas review, the district court noted:

> The policies underlying deference to a state procedural default are inapplicable where the state itself does not apply or enforce the rule. When a state court does not rely on a waiver of a constitutional claim, but goes beyond the alleged waiver to rule on the merits, a federal court can also reach the merits of the claim without the cause-prejudice standard of *Wainwright v. Sykes* being met.

Id. at 951. Thus, a state court's complete failure to note waiver allows a federal court to review the merits of a claim. In *Farmer v. Prast*, 721 F.2d 602 (7th Cir. 1983), we addressed the effect of a state court decision which relied both on a procedural default and on the weakness of the appellant's claim on the merits. There we determined that when a state court relies both on waiver and a rejection of the claim on the merits—a federal court will respect the alternate *res judicata* ground of the

1. It appears that Harris was represented on appeal by counsel from the State Appellate Defenders Office and was no longer represented by Assistant Public Defenders, thus making it more difficult to show cause for the failure to raise the issue on direct appeal.

order and will be precluded from reaching the merits of the claim. *See also Phillips v. Lane*, 787 F.2d 208, 211 (7th Cir.1986).

The state appellate court order at issue here is distinguishable from the orders in both *Williams* and *Farmer*. In *Williams*, the court completely ignored waiver, while in *Farmer*, the court expressly relied, in part, on waiver. The state court here did neither. In examining Harris' post-conviction petition, the state court noted that failure to present an issue on direct appeal precludes post-conviction review unless the nature of the issue is such that it could not have been raised on direct appeal. The district court then examined the trial court record and found that all grounds, save that relating to the alibi witnesses, could have been presented on direct appeal. Without expressly finding that all other grounds were waived, the court then proceeded to a short discussion of general standards for judging a claim of ineffective counsel. Next, the court analyzed both trial counsel's failure to call alibi witnesses, as well as other grounds that could have been raised on direct appeal and concluded that Harris had received the effective assistance of his trial counsel.

The district court found the state court order analogous to that in *People v. Ross*, 63 Ill.App.3d 884, 20 Ill.Dec. 688, 380 N.E.2d 897 (1st Dist.1978), in which the Illinois Appellate Court noted a waiver problem but decided to examine the case on its merits. In *Ross*, however, the court explicitly stated its determination to ignore the procedural default. Here, we have no such clear expression of intent. There is neither an explicit finding of waiver nor an expression of an intention to ignore waiver. The order is ambiguous because the court addressed the merits of some of the petitioner's claims which it clearly implied had been waived.

[3] While we do not require an explicit finding of waiver nor an explicit statement of intention to ignore waiver, it is clearly more helpful to include such language. In considering whether a state court chose to condone a procedural default, a reviewing court should try to assess the state court's intention to the extent that this is possible. Upon review of the state court order, we find we must disagree with the district court in this regard. A full reading of the order suggests to us that the appellate court intended to find all grounds waived except that pertaining to the alibi witnesses. The court then proceeded, as an alternate holding, to reject Harris' claim on its merits. Under these circumstances, we find that the order was closer to that in *Farmer*, where the state court relied on alternate grounds for its finding. We cannot find that the state court intended to ignore the procedural default. Accordingly, we are precluded from reviewing the argument raised in the petition, and the order dismissing the habeas corpus petition is

AFFIRMED.

CUDAHY, Circuit Judge, concurring:

I write separately only to indicate my view that the ineffective assistance of counsel claim should not be treated as waived. As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived. The Illinois court considered the claim on its merits. Rather than attempting to divine the unspoken "intent" of that court, I think we should invoke a presumption that waiver not clearly found has been condoned. Waiver, particularly of an ineffective assistance claim on direct appeal, is an essentially technical ground for avoiding very difficult, very important and very close issues on the merits. Certainly it is within the state courts' power to protect their procedural requirements merely by making express findings that a petitioner has waived.

Judge Getzendanner struggled with the important and difficult issues here and, after a hearing lasting three days, denied the petition. Although the matter is very close, I would support her determination and thereby reach the same result as the majority but by a different route.

WEST KEY NUMBER SYSTEM

a Petition for Rehearing or ... the same.

Jordan 28th floor.

Affirmed 2-22-83

1st Division
February 22, 1983

81-871

Check app. of opinion

78-1193

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

83-123

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
vs.	)	
WARREN HARRIS, Defendant-Appellant.	)	Honorable Arthur J. Cieslik, Judge Presiding.

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Defendant, Warren Harris, appeals from an order granting the State's motion to dismiss his petition for post-conviction relief, contending that he was improperly denied an evidentiary hearing.

The record shows that defendant was tried before a jury, convicted of murder, and then sentenced to serve 50 to 100 years in the penitentiary. That judgment was affirmed on direct appeal pursuant to Supreme Court Rule 23. People v. Harris (1979), 71 Ill. App. 3d 1113.

The facts set forth in the order affirming his conviction reveal that defendant fatally shot Earnest Howard about 10 p.m. on July 9, 1977. The chief prosecution witness was Antonio Slater who testified that he was driving on Christiana Avenue in Chicago that evening when a

81-871

parked car blocked his path. He heard a gunshot and saw two men standing on the sidewalk in front of the parked car. The man facing Slater began to fall and defendant pushed him away, turned and ran back to the car. As he reached the passenger door, the beam of one of Slater's headlights shone on defendant above the waist. Defendant then drew a gun and pointed it at Slater, causing Slater to crouch down in his car. Defendant entered the parked car and was driven away. Slater also drove off but did not report his presence to the police for about six weeks. He indicated that he knew defendant because he had seen him several times in a pool hall and was able to see his face after the shooting.

At trial, defendant was represented by an assistant public defender. During cross-examination of Slater, he attempted to impeach Slater by showing the discrepancies between his signed statement and his testimony at a preliminary hearing, by showing inconsistencies in his trial testimony, and raising questions about where he had previously seen the defendant.

In his direct appeal defendant was represented by the office of the State Appellate Defender, and the sole issue presented for review was whether defendant had been proved guilty beyond a reasonable doubt. When this issue was resolved against him, defendant filed a pro se petition for post-conviction relief. (Ill. Rev. Stat. 1979, ch. 38, pars. 122-1 et seq.) Private counsel was appointed to represent him on the petition and an amended petition was prepared and filed.

In that petition defendant alleged that he was denied his right to the effective assistance of counsel in that his trial counsel failed

to properly prepare for trial because he did not interview or call two witnesses who saw two men running from the scene; Melvin McWhorter was identified as one of these men. Defendant also alleged that his trial counsel failed to call George Williams as a witness to testify that he was the man with McWhorter on the night of the shooting; that counsel failed to seek disclosure of the identity of the informant who provided police with the name of the State's only identification witness five weeks after the shooting; that counsel failed to call a rebuttal witness to impeach Slater's testimony that he voluntarily went to the police; that counsel failed to offer into evidence a stipulation that would have perfected the impeachment of Slater on the issue of his turning onto Christiana from 16th Street; that counsel failed to investigate and seriously consider defendant's potentially viable alibi defense, or contact alibi witnesses; and that counsel failed to inform defendant that no evidence or alibi would be offered in his defense until the morning on which the defense was to go forward and then ignored defendant's objection to this procedure.

Attached to the petition was the affidavit of Melvin McWhorter who stated that he was acquainted with the deceased and bought narcotics from him and that he was present when he was shot by George Williams. He also averred that he is acquainted with Slater, whom he knew to be a drug addict, and that he was not present in the area on the night deceased was killed.

The affidavits of Jewel, Mary and Genise Conner, friends of the defendant, were also attached in which they averred that defendant was

sick in bed on the day of the shooting in the home of Jewel Conner. Jewel also stated that she notified defense counsel of this potential alibi defense and that she was available to testify as a witness but was never contacted.

The defendant also attached the answer to discovery filed by his trial attorney and various police reports which were also filed in conjunction with the incident. These reflected interviews with two persons who identified McWhorter as one of two men seen fleeing from the incident, an interview with McWhorter in which he denied any knowledge of the shooting, and an interview with Williams.

The State filed a motion to dismiss alleging, inter alia, that the doctrines of res judicata and waiver were applicable in light of the affirmance of the judgment on direct appeal. The defendant's petition was dismissed without an evidentiary hearing and this appeal followed. Defendant now maintains that an evidentiary hearing should have been held to determine the merits of his allegation of incompetence of counsel or, in the alternative, that the State should have been required to file an answer. The State initially responds that defendant has waived his right to assert a claim of the incompetence of his trial counsel because he failed to raise this issue in his direct appeal.

It is well settled that where a direct appeal is taken from a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those which could have been presented, but were not, are considered waived. (People v. French (1970), 46 Ill. 2d 104, 262 N.E.2d 901.) Where, however, the allegations in a post-conviction petition are based on facts which do not appear in the record,

they are not barred by the doctrine of res judicata. People v. Edmonds (1979), 79 Ill. App. 3d 33, 398 N.E.2d 230.

In the instant case, defendant alleges incompetence because his trial counsel failed to investigate or call several witnesses on his behalf, to perfect impeachment of the State's chief witness, or to investigate and present an alibi defense. Our examination of the record in this appeal indicates that, except for the alibi witnesses, the identity of the persons set forth by the defendant and their statements to the police were of record, and it also appears that the stipulation alluded to by defendant was contained in the trial record. As such, these matters could have been raised in defendant's direct appeal. (See People v. Churchill (1981), 92 Ill. App. 3d 1006, 416 N.E.2d 395.) In this regard we find it noteworthy that defendant's appellate counsel was not affiliated in any way with his trial counsel, and there is also no indication that defendant expressed any dissatisfaction with his trial counsel at the time the appeal was filed or raised any question regarding the competency of his trial counsel. See People v. Stewart (1978), 66 Ill. App. 3d 342, 383 N.E.2d 1179.

Competency is determined from the totality of counsel's conduct at trial. (People v. Murphy (1978), 72 Ill. 2d 421, 381 N.E.2d 677.) In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney, and that this incompetence produced substantial prejudice to him without which the result of the trial

would probably have been different. People v. Talley (1981), 97 Ill. App. 3d 439, 422 N.E.2d 1084.

Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present the alibi witnesses and to present an alibi defense. The affidavits show that the Conners made themselves available to defense counsel but were never called as witnesses to testify as to defendant's whereabouts at the time of the shooting.

The determination of whether or not to call a witness is generally regarded as a matter of trial strategy, and, even if it were error on the part of trial counsel not to introduce this testimony, errors in strategy and judgment on the part of counsel do not render the representation incompetent. People v. Pendleton (1982), 104 Ill. App. 3d 1104, 433 N.E.2d 1076, and cases cited therein.

It appears on this record that counsel's strategy was to rely on the State's inability to prove the defendant guilty beyond a reasonable doubt as indicated in his answer to discovery. The facts gleaned from the order affirming defendant's conviction indicate that counsel decided to emphasize the discrepancies in the testimony of the State's only eyewitness. To this end he vigorously cross-examined Slater in an attempt to impeach his testimony and point out the inconsistencies in his statements. The fact that an attorney in the better light of hindsight might have handled the trial in a different manner is not an indication of trial counsel's incompetence. People v. Elder (1979), 73 Ill. App. 3d 192, 391 N.E.2d 403; see also People v. Martinez (1982), 104 Ill. App. 3d 990, 433 N.E.2d 981.

Before an evidentiary hearing is required in a post-conviction proceeding, a petitioner must make a substantial showing of a violation of a constitutional right (People v. Farnsley (1973), 53 Ill. 2d 537, 293 N.E.2d 600), and a reviewing court will not reverse the determination of the trial court in that regard unless it was manifestly erroneous (People v. Murphy (1979), 78 Ill. App. 3d 132, 397 N.E.2d 68).

Viewing defendant's petition and supporting affidavits in light of the record, we do not believe that he has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook Court.

Dated at Chicago, Illinois, this 22nd day of February, 1983.

BUCKLEY, P.J., McGLOON and GOLDBERG, JJ.

memorandum of law. Defendants may file opposing affidavits and a memorandum of law. The matter will be determined on those submissions unless something additional is required. Plaintiffs' submission should be filed within three weeks from the date of the order to be entered herein. Defendants' opposition papers should be filed one week later.

In sum plaintiffs are granted judgment against Telewide for breach of contract and breach of warranty in the sum of $4,262,021.75. Plaintiffs are granted judgment jointly and severally against Telewide and Schubert for fraud and fraudulent representation and fraudulent breach of warranty in the sum of $4,262,021.75. On each of these judgments plaintiffs are entitled to recover prejudgment interest from May 20, 1980. Plaintiffs are granted punitive damages assessed jointly and severally against Schubert and Telewide in the sum of $500,000. Finally, plaintiffs are entitled to an award of attorney's fees to be assessed against defendants and their counsel. Plaintiffs are to recover their costs.

Plaintiffs should submit an order and judgment for the court's signature on notice to defendants, and defendants may submit a counter order.

IT IS SO ORDERED.

UNITED STATES of America ex rel. Warren Lee HARRIS, Petitioner,

v.

Marvin REED, Respondent.

No. 80 C 513.

United States District Court, N.D. Illinois, E.D.

April 8, 1985.

On petition for writ of habeas corpus, respondent moved for summary judgment. The District Court, Getzendanner, J., held that: (1) Illinois' delay in disposing of petitioner's postconviction petition was not so egregious as to justify issuance of writ for violation of petitioner's federal due process rights; (2) evidentiary hearing was required on issue of whether petitioner was denied effective assistance of counsel at his state trial; (3) habeas court was barred from considering merits of claim of newly discovered evidence; and (4) evidence was sufficient to support conviction.

Motion granted in part and denied in part.

1. **Habeas Corpus ⇐45.3(9)**

Where petitioner had exhausted his state appellate and postconviction remedies, claim that petitioner was unduly prejudiced and should be excused from exhaustion requirement because of inordinate delay in disposition of state postconviction relief petition was moot.

2. **Habeas Corpus ⇐45.3(7)**

Inordinate delays in state procedures, such as posttrial motions, appeals, and postconviction remedies, may excuse exhaustion where exhaustion is not considered a jurisdictional requirement.

3. **Habeas Corpus ⇐45.3(1.50)**

Remedy for inordinate delay in state procedures is normally immediate consideration by federal court of habeas petitioner's federal claims, an effective waiver of exhaustion requirement.

4. **Habeas Corpus ⇐45.3(7)**

Petitioner suffered no prejudice from Illinois' delay in disposing of his postconviction petition, as might violate his right to full and fair consideration of his federal habeas claims in federal court, where testimony of alibi witness who had died would have been cumulative and petitioner did not claim that three alibi witnesses who had moved out of state were inaccessible.

5. Constitutional Law ⇐270.5
Habeas Corpus ⇐45.3(7)

Illinois' delay in disposing of petitioner's postconviction petition, apparently the result of misplacement of petitioner's postconviction petition, could not have violated petitioner's federal due process rights, and seven and one-half month delay was not so egregious that, absent prejudice, it could justify issuance of writ of habeas corpus. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇐998(3)

Under Illinois law, failure to raise on appeal the issue of ineffective assistance of trial counsel results in waiver of that issue for postconviction review; there is an exception where basis for claim is not found in the record.

7. Habeas Corpus ⇐45.3(1.30)

Waiver of right to present issue to federal courts on collateral review may be overcome only by showing of cause and resulting prejudice; cause and prejudice are flexible concepts, satisfaction of which changes with circumstances of particular petitioner.

8. Habeas Corpus ⇐45.3(1.30)

"Waiver" of right to present issue to federal courts on collateral review, if not cured by satisfaction of cause and prejudice, may be ignored under circumstances constituting miscarriage of justice.

9. Habeas Corpus ⇐45.3(1.30, 1.50)

Where state court ignores procedural default and reviews substantive merits of what would otherwise be a waived issue, federal courts must review merits of that issue in petition for habeas corpus; but where state court has clearly reached both merits of waiver question and substantive merits of improperly raised issue, federal collateral review is barred, absent showing of cause and prejudice.

10. Habeas Corpus ⇐45.3(1.40)

Petitioner's ineffective assistance of counsel claim could be presented to federal court with respect to all omissions raised in amended postconviction petition, where Illinois state court, in its denial of petitioner's postconviction appeal, simply noted that waiver appeared to operate, but then continued to treat merits of improperly raised issue.

11. Criminal Law ⇐641.13(1)

Convicted defendant, to prevail on ineffective assistance of counsel claim, must demonstrate that counsel's representation fell below objective standard of reasonableness, and that error had an effect on judgment. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(1)

When examining counsel's performance, court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance that might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(1)

Defense attorney's discretion is broad, and so-called "trial strategy" may excuse omissions that otherwise would appear inexcusable. U.S.C.A. Const.Amend. 6.

14. Habeas Corpus ⇐90.2(3)

Evidentiary hearing was required on issue of whether petitioner was denied effective assistance of counsel at his state trial, where petitioner may have been prejudiced, and rendered ineffective assistance, by counsel's failure to interview and call numerous witnesses, which conduct would fall below standard of reasonably competent representation. U.S.C.A. Const. Amend. 6.

15. Habeas Corpus ⇐90.2(3)

Evidentiary hearing is appropriate when facts are in dispute and petitioner was not afforded full and fair hearing on ineffective assistance issue in state system. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐938(1)

Under Illinois law, in order to obtain new trial based on newly discovered evidence, defendant must show that evidence could not have been produced at trial by use of reasonable diligence, that evidence is noncumulative, and that evidence is of such

conclusive character that it would probably change result.

17. Criminal Law ⇐905

Motions for new trial are subject to close scrutiny.

18. Criminal Law ⇐958(1)

Newly discovered evidence must be presented to trial court in motion for new trial.

19. Criminal Law ⇐951(1)

Exceptions to Illinois' requirement that motions for new trial be brought within 30 days following entry of finding or return of verdict are narrow.

20. Habeas Corpus ⇐45.3(1.40)

Habeas court was barred from considering merits of claim of newly discovered evidence, where petitioner failed to make this claim before both postconviction and direct appeal lower and appellate courts. Ill.S.H.A. ch. 38, ¶¶ 116–1, 116–1(b).

21. Habeas Corpus ⇐92(1)

Federal court will not review merits of state court's denial of new trial motion solely under state standards for granting of new trial.

22. Habeas Corpus ⇐90.2(1)

Where newly discovered evidence is alleged in habeas application, evidence which could not reasonably have been presented to state trier of facts, federal court must grant evidentiary hearing; such evidence must bear upon constitutionality of petitioner's detention, and mere existence of newly discovered evidence relevant to guilt of state prisoner is not ground for relief on federal habeas corpus.

23. Criminal Law ⇐938(1)

Newly discovered evidence, namely, affidavit absolving petitioner of shooting, would not have entitled petitioner to new trial under Illinois law where petitioner failed to offer justifiable reason for not presenting this evidence at trial and affiant's testimony lacked credibility.

24. Criminal Law ⇐1144.13(3, 5), 1159.2(7)

In determining whether federal convictions are supported by constitutionally sufficient evidence, "reasonable doubt" test is applied, and this test is satisfied when reviewing court finds that, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond reasonable doubt; in applying this test, reviewing court must assume that jury drew all reasonable inferences in prosecution's favor. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

25. Homicide ⇐250

Murder conviction was supported by sufficient evidence, including eyewitness testimony.

Warren Lee Harris, pro se.

Jack Donatelli, Asst. Atty. Gen., Chicago, Ill., for respondent.

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

This action is before the court on the petition for a writ of habeas corpus, 28 U.S.C. § 2254, of Warren Lee Harris. The parties have briefed respondent's motion for summary judgment. Moreover, the parties have provided the court with additional materials from the state court record. For the reasons stated below, respondent's motion for summary judgment is granted in part and denied in part. An evidentiary hearing is required to determine the merits of the one outstanding claim. The court therefore will appoint an attorney to aid Harris in this evidentiary hearing.

Factual Discussion

On December 21, 1977, after a three-day jury trial, Harris was found guilty of murder on the testimony of the state's one occurrence witness, Antonio Slater. Ac-

cording to Slater, Harris shot and killed one Earnest Howard on the night of July 9, 1977, near the area of 16th and Christiana streets in Chicago, Illinois. On February 2, 1978, Harris was sentenced to serve 50 to 100 years in the state penitentiary.

At trial, Public Defenders Todd Musberger and Kathy Kuhlen represented Harris. In her opening statement on December 19, 1977, Kuhlen made the following remarks:

> At this time, I would like to mention [one] of the names that Mr. Fuenty [prosecutor] brought up and also another name that he didn't mention that I think will figure quite prominently in this trial, that other name is Melvin McWhorter, also known as Buster on the street.
>
> To understand the importance of Mr. McWhorter and of Antonio Slater, it is necessary to give you a brief review of the police investigation in this case. During the days immediately following the shooting of Earnest Howard the police talked to a number of people who were present in the area of 16th and Christiana, people who lived there and also to relatives of Earnest Howard. They learned that Earnest Howard was a narcotics dealer who sold in that neighborhood at 16th and Christiana.
>
> . . . . . .
>
> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.
>
> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that . . . he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Trial Transcript 31–33.) Kuhlen continued, discussing how Slater's statement to the police switched the focus of suspicion to Harris from McWhorter, and asking the jury to examine carefully Slater's credibility.

The state first called Howard's father to testify that he identified his son's body at the morgue. This was not objected to, although the identity of the victim was not in dispute. Harris does not claim error from this failure.

The state next called Maurice Williams, who knew the victim as "Pete." Williams came to Pete's aid soon after the shooting by calling the police. Williams testified that he noticed McWhorter (Buster) among the crowd of persons that had gathered around the scene of the shooting. (Tr. 46, 51.)

On December 20, 1977, the state examined Officer Joseph Michello, one of the police officers that appeared on the scene after the shooting. Musberger's cross-examination centered on the location of Howard's body upon his arrival on the scene.

The state next called Antonio Slater, who explained on direct examination that he arrived at the scene of the shooting while driving south on Christiana (a one-way southbound street) at about 20 m.p.h. Slater testified that he crossed the intersection of 16th and Christiana and when he was about 12 feet behind a parked vehicle that was blocking his way, he heard a shot and noticed two men standing near each other. He witnessed the man with his back to Slater push the other man, who fell. This occurred about 12 feet in front, or south, of the car that was parked in front of Slater's. The man who had pushed the other man down, turned and ran to the parked car, turned and faced Slater, pulled up a pistol at Slater, and jumped into the passenger

section of the car. (R. 71–76.) When the pistol was pointed at him, Slater crouched. (R. 79.) The car pulled away. (R. 76.)

When asked to identify the man who apparently shot Howard, Slater responded, "Wayne" and in court identified Harris as Wayne. (R. 77–78.) Slater testified that he knew Wayne from a poolroom at 18th and Kedzie. He testified:

> I don't actually know [Harris], I know him by people speaking to him, you know, but about two years I have seen him up there . . . . about once or twice a month.

(R. 78.) Slater was able to see Wayne because gold street lights along Christiana were lit and because his headlights were shining on Wayne's waist. (R. 81.)

Slater was next asked about going to the police station. He testified that he went there in August 1977 with his uncle and talked to Investigator Tom Shine. Slater testified that he had not been contacted before he went to the station. (R. 84.)

Musberger then cross-examined Slater. He first pointed out that it took Slater six weeks to go to the police with his story. (R. 89.) He highlighted that Slater had changed his reason for having been in the area of 15th and Christiana on that night. Musberger also highlighted inconsistencies between Slater's pretrial statements and his trial testimony. Musberger also impeached Slater's story that he had seen Wayne several times over the previous two years. (R. 109–110.)

After Slater, two other witnesses were called by the prosecution on the issue of the cause of death. On December 21, 1977, the defense rested without putting on any evidence. (R. 130.) The portions of the opening argument suggesting that McWhorter or others might have been responsible for the shooting were ignored completely. Later that afternoon, the jury returned a verdict that Harris was guilty of murder.

After sentencing, Harris was represented by an Assistant Appellate Defender, Nancy Abrahams, on direct appeal. Abrahams presented one argument on appeal, namely, that the evidence was insufficient constitutionally to support a conviction for murder. (Respondent's Attachment, filed 2/15/85, Brief for Appellant.) On June 4, 1979, the Appellate Court found the evidence constitutionally sufficient and affirmed the conviction. (*Id.* at Order Disposing of Appeal under Supreme Court Rule 23 [direct appeal]).

On July 17, 1979, Abrahams, as Harris's stand-by counsel, filed Harris's pro se petition for post-conviction relief. (Harris's Motion in Opposition, filed 11/21/83, at 8–9.) In the post-conviction petition, Harris raised two issues: (1) ineffective assistance of trial counsel, and (2) newly discovered evidence. The public defender's office was granted leave to withdraw, and Attorney Loretta Hall Hardiman assumed prosecution of the petition. She filed an amended post-conviction petition, dropping the newly discovered evidence claim.

The lower post-conviction court held a hearing on March 27, 1980. A second hearing on the amended petition occurred on March 19, 1981. (The transcript is attached as Exhibit 3 to Harris's Motion to Reconsider, filed 10/18/82.) The court denied the petition at the close of that hearing, without convening a hearing in which to take testimony. *Id.* at 27. Assistant Appellate Defender Bruce Mosbacher represented Harris on appeal of this decision. The denial of post-conviction relief was affirmed on February 22, 1983. (Respondent's Answer and Memorandum, filed 10/21/83, Order Disposing of Appeal Under Supreme Court Rule 23 [post-conviction].)

Claims for Relief

Harris first claims that he was unduly prejudiced by the state court delay in disposing of his post-conviction petition. According to Harris, certain alibi witnesses (the Connor family) moved to Mississippi in late 1979 and Z. Mary Connor died in December 1979. (Original Petition, attachment, at 1–2.) This loss of evidence, caused by the alleged inexplicable delay, is offered as support for the claim that Har-

ris is now in custody in violation of the federal constitution.

Harris's second claim for relief is based on alleged ineffective assistance of counsel. According to Harris, his trial counsel failed properly to investigate witnesses and to impeach the testimony of Antonio Slater. Harris listed several errors in his amended petition for habeas corpus, all of which were raised in his amended petition for post-conviction relief.

1. Counsel failed to interview or call as witnesses Investigators B. Peck and L. Sykes to impeach Slater. These witnesses would testify that "the victim was shot in the gangway," although Slater testified the victim was shot on Christiana street. (Amended Petition for Habeas Corpus Item H.)

2. Counsel failed to interview or call as witnesses Alice Riles or Leroy Carter. Both saw two men running from the scene of the shooting at the time of the shooting. Both identified McWhorter as one of the two men. Riles indicated in the police report that she could identify the other man by appearance. Police records contained this information.

3. Counsel failed to investigate or call as a witness George Williams. Williams would testify that he was with McWhorter the night of the shooting, that he knew the victim through a long history of drug dealings, and that Harris was not at the scene of the shooting. Police records contained this information.

4. Counsel failed to call police investigator Shine or any other investigator to impeach Slater's testimony that he did not hang out in the area of the shooting and that he had never been in that area. Shine also could have impeached Slater's statement that he came to the police station voluntarily, although Shine's report indicates an informant provided Slater's name and the police contacted Slater. Counsel also did not seek the identity of the informant.

5. Counsel failed to offer into evidence the agreed stipulation that "would have perfected the impeachment of the witness Slater [sic] trial testimony that he turned off Christiana from 16th Street and witness [sic] the crime." (*Id.* at Item O.)

6. Counsel failed to call or investigate residents of 18th and Kedzie, who could testify that no pool room existed at that corner, thereby impeaching Slater's testimony that he knew Harris as Wayne from "seeing him every month at a pool room on 18th and Kedzie." (*Id.* at Item Q.)

7. Counsel failed to interview, investigate, or call as witnesses four alibi witnesses: Jewel Connor, Z. Mary Connor, Genise Connor, and Charles Thomas. Harris provided counsel with the names and addresses of the witnesses. These witnesses would have testified that Harris was ill and in bed at the Connor's home on the night of July 9, 1977 and was later hospitalized on July 13, 1977 for that same illness. (See Affidavits attached to original petition for habeas corpus.)

8. Counsel failed to call any of the doctors who treated Harris at Cook County Hospital to testify and corroborate his alibi witnesses' story that he was hospitalized on July 13, 1977 with an illness that would indicate he was also ill on July 9, 1977.

All of the names contained in this list of alleged errors, except the names of the alibi witnesses, are contained in the police records and in the state's list of potential witnesses. (See Harris's Requested Records and Information filed 2/25/85 [Answer to Discovery].) According to Harris's amended post-conviction petition, he did not learn that counsel would present no defense evidence until December 21, 1977, the last day of trial. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 1 at p. 3 [Amended Petition for Post-Conviction Relief].)

Harris's third contention is that his detention is unconstitutional because newly discovered evidence establishes his innocence. This evidence is an affidavit executed by Melvin McWhorter, who would testify that Slater was not present at the scene of the shooting and that he witnessed George Williams shoot the victim. Harris notes that Riles, Carter, and Williams corroborate some of these facts, including that Williams and McWhorter were together that night and that McWhorter was seen leaving the scene of the shooting. (The court notes that, accepting as true Harris's counsel's opening statements, this would be McWhorter's third story. The first was that he knew nothing about the shooting; the second, that he was across the street from the shooting but saw nothing; and the third, that he saw Williams shoot Howard.)

Harris's final claim is that the evidence was constitutionally insufficient to convict him of murder beyond a reasonable doubt. He claims Slater's testimony was so inconsistent as to be incredible.

Legal Discussion

I. Post-Conviction Delay

Harris's first claim for relief stems from alleged prejudicial delay in the disposition of his Illinois petition for post-conviction relief. This claim was raised in Harris's original habeas corpus petition, which was received by the Clerk of the United States District Court on January 31, 1980 and filed on February 8, 1980. Harris had previously filed, on July 17, 1979, a petition for post-conviction relief. (Stand-by counsel Abrahams' affidavit evidences that she filed the petition on that date. *See* Abrahams Aff., attached to original petition for habeas corpus.)

Starting in early 1980, therefore, Harris had proceedings concerning the validity of his conviction pending simultaneously in both federal and state court. While District Judge Joel Flaum considered various issues regarding Harris's petition (basically mootness and exhaustion), Harris attempted to get his claims resolved in state court as well. The post-conviction petition was denied by the lower state court on March 21, 1981. On October 4, 1982, the federal district court dismissed Harris's petition for failure to exhaust available state remedies, because Harris at that time had an appeal of the post-conviction decision pending in the Illinois Appellate Court. On April 4, 1983, Judge Flaum granted Harris's motion to reinstate his action and file an amended petition for habeas corpus, as exhaustion had been accomplished by that date.

Harris complains that his petition for post-conviction relief was "in limbo" for 7½ months before any action thereon was taken by the Illinois courts. Since one of his four alibi witnesses died in late December 1979 and all had moved to Mississippi by the end of 1979, Harris contends that the delay in processing his post-conviction petition was unconstitutionally prejudicial.

[1–3] To the extent that Harris's claim based on post-conviction delay sought relief from the exhaustion requirement in habeas cases, that claim is clearly moot. Inordinate delays in state procedures, such as post-trial motions, appeals, and post-conviction remedies, may excuse exhaustion in circuits where exhaustion is not considered a jurisdictional requirement. *See McGee v. Estelle*, 722 F.2d 1206, 1209–11 (5th Cir. 1984); *Baldwin v. Lewis*, 442 F.2d 29, 32–33 (7th Cir.1971). The remedy for inordinate delay is normally immediate consideration by the federal court of petitioner's federal claims, an effective waiver of the exhaustion requirement. *See Dixon v. State of Florida*, 388 F.2d 424, 426 (5th Cir.1968); *Rheuark v. Wade*, 540 F.2d 1282, 1283 (5th Cir.1976) (direct appeal); *cf. United States ex rel. Smith v. Twomey*, 486 F.2d 736, 738–39 (7th Cir.1973), *cert. denied*, 416 U.S. 994, 94 S.Ct. 2408, 40 L.Ed.2d 773, *reh'g denied*, 417 U.S. 959, 94 S.Ct. 3089, 41 L.Ed.2d 677 (1974). However, because Harris has exhausted his state appellate and post-conviction remedies, such a claim would now be moot.

Harris may also be arguing that the Illinois delay effectively deprived him of the right to present his constitutional claims in a federal forum, as evidence was lost during the delay. Harris is thus not attacking the adequacy of Illinois post-conviction procedures per se—an attack that would prob-

ably not rise to a constitutional violation, *see Williams v. State of Missouri*, 640 F.2d 140, 143–44 (8th Cir.), *cert. denied*, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981)—but the effect of Illinois post-conviction procedures on the federal right of habeas corpus. At least one court has hinted that an inordinate delay, in that case twelve years, may violate petitioner's rights, even absent any trial error. *Codispoti v. Howard*, 589 F.2d 135, 142 (3d Cir. 1978).

[4] Assuming that the Illinois delay in disposing of Harris's post-conviction petition was inordinate and could violate his right to a full and fair consideration of his federal habeas claims in federal court, however, Harris's claim appears to be without merit. The death of one of four alibi witnesses, Z. Mary Connor, alone is not prejudicial, since her testimony would be cumulative (all were in the same dwelling with Harris on the night of the shooting; three, including the deceased witness, executed affidavits to that fact). Moreover, while the witnesses now live out of state, Harris does not claim that they are inaccessible should their testimony be needed. On the present record, therefore, Harris has suffered no prejudice from the delay.

[5] The court doubts that post-conviction delays, absent a showing of prejudice, alone could justify release of a petitioner for federal habeas corpus relief. Even if such a delay by itself could be reason for release, however, the delay in this case could not have violated Harris's federal due process rights. This delay appears to have been the result of misplacement of Harris's post-conviction petition. Moreover, cases examining delays in state procedures involve time periods far in excess of seven months. The 7½ month delay in this case is not so egregious that, absent prejudice, it could justify issuance of the writ for violation of Harris's federal due process rights.

Respondent's motion for summary judgment is granted as to Harris's claim of post-conviction delay.

II. Ineffective Assistance of Counsel

A. Waiver

As was discussed above, the one issue presented on direct appeal by Assistant Appellate Defender Nancy Abrahams was the lack of sufficient evidence on which to convict. The court's own examination of Harris's and the state's legal memoranda on direct appeal confirms this fact. Moreover, the Illinois Appellate Court's opinion on direct appeal addressed only the sufficiency of the evidence, and not the other issues raised by Harris in his petition for federal collateral review.

The original and amended post-conviction petitions raised the issue of ineffective assistance of trial counsel. The court is provided with the transcript of the March 19, 1981 lower court post-conviction hearing. The transcript reveals that Harris's attorney Hardiman and the state vigorously disputed the merits of the ineffective assistance of counsel claim. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 6–27 [Transcript].) However, the parties also discussed the possibility that Harris waived his right to raise the issue through failure to preserve it on direct appeal. (*Id.* at 3–4, 7.) Moreover, the hearing court was aware of the waiver issue, as demonstrated by this comment:

> My question as a judge in this case is to determine whether or not, as a result of the trial that was had, the defendant had a fair trial, ... and if not, any matters that were improperly handled, those matters should have been raised on the basis of an appeal [sic].

(*Id.* at 26.) In any case, the hearing court also appeared to reach the merits of the ineffective assistance claim:

> On the basis of [the fact that the alibi witnesses were Harris's friends], I have considered all aspects, I have heard your arguments, I have heard the arguments of the state, and it is the opinion of the court that the defendant had been properly represented, that he had been given proper consideration on his appeal, both by the appellate court and the supreme court, and accordingly, this court is hereby denying your petition, and it is hereby dismissed.

(*Id.* at 27.)

In affirming the denial of Harris's post-conviction petition, the Illinois Appellate Court noted that in Illinois, arguments raised in post-conviction proceedings but not preserved on appeal are barred by *res judicata* if the arguments are based on facts that are of record. *See People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist.1979). The Court then pointed out that all facts, except those relating to the alibi witnesses, were reflected in the trial court record.

After making this point, the Court did not conclude that Harris had waived his ineffective assistance claims in full, but instead went on to consider the merits of those claims. The Court's manner of addressing the claims indicates that it considered the merits of the ineffective assistance arguments with respect to the alibi witnesses as well as with respect to of-record evidence:

> Competency is determined from the totality of counsels's conduct at trial. [Citation omitted.] In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney....
>
> Defendant *also* contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present alibi witnesses and to present an alibi defense.

(Respondent's Answer and Memorandum, filed 10/21/83, "Order Disposing of Appeal Under Supreme Court Rule 23", at 5–6 [post-conviction].) (emphasis added.)

The Court continued to discuss the standards of effective assistance and to evaluate the quality of the assistance provided in Harris's case. For example, the Court noted trial counsel's vigorous cross-examination of Slater, which highlighted certain inconsistencies between his trial testimony and his pre-trial statements. The Court also pointed out that trial counsel has great discretion in determining which, if any, witnesses to call in his or her client's defense. According to the Court, Harris's counsel could reasonably and competently have chosen to rely on cross-examination of state witnesses and the state's failure to sustain its burden in prosecuting Harris. (*Id.* at 6.) The Court concluded that "the representation [Harris] received at trial [did not result] in substantial prejudice without which the outcome would probably have been different." (*Id.* at 7.)

[6] It is clear that in Illinois, failure to raise on appeal the issue of ineffective assistance of trial counsel results in waiver of that issue for post-conviction review. *People v. Edmonds, supra; see* cases collected in *United States ex rel. Devine v. DeRobertis*, 754 F.2d 764, 766 n. 1 (7th Cir.1985). These authorities indicate that an exception to the waiver rule occurs when the basis for the claim is not found in the record.

In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Supreme Court held that a petitioner could not litigate collaterally in federal court an issue that state procedural law prevented from being presented to the state appellate courts. This ruling was extended by the Seventh Circuit in *United States ex rel. Spurlack v. Wolff*, 699 F.2d 354, 356 (7th Cir.1983), to a failure to present properly preserved trial objections on appeal.

[7, 8] Under *Sykes*, such a "waiver" of the right to present an issue to the federal courts on collateral review may be overcome only by a showing of "cause" and resulting "prejudice." Cause and prejudice are flexible concepts, satisfaction of which changes with the circumstances of a particular petitioner. *Clay v. Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 433–34 (7th Cir.1984). Moreover, under circumstances constituting a "miscarriage of justice," a *Sykes* waiver, not cured by satisfaction of the cause and prejudice test, may be ignored. *Id.*

[9] Sometimes a state court will consider the merits of an issue that may not have

been properly preserved by timely objection or appeal. Where a state court ignores a procedural default and reviews the substantive merits of what would otherwise be a waived issue, federal courts must review the merits of that issue in a petition for habeas corpus. *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 951, (7th Cir.1982). However, where a state court has clearly reached both the merits of the waiver question and the substantive merits of the improperly raised issue, the Seventh Circuit has found that absent a showing of cause and prejudice, *Sykes* bars federal collateral review. *Farmer v. Prast*, 721 F.2d 602, 605 & n. 5 (7th Cir. 1983); *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir.1982); *see Jentges v. Milwaukee County Circuit Court*, 733 F.2d 1238, 1243 n. 1 (7th Cir. 1984).

In the present case, the Illinois Appellate Court made clear, and respondent agrees, that the issue of ineffective assistance of counsel was not waived as to facts not in record. According to the Appellate Court, those facts include the affidavits of the four alibi witnesses. This court notes additionally that the record appears to contain no indication (1) that Harris might have been confined to Cook County Hospital shortly after the shooting as a result of a serious illness, (2) that no poolroom existed at 18th and Kedzie, and (3) that McWhorter swore that George Williams committed the shooting. Respondent argues that to the extent that Harris's ineffective assistance of counsel claim depends on trial counsel's omissions indicated in the record, the claim was waived.

The court's review of the trial and appellate opinions on post-conviction review persuades it that the Illinois state courts ignored any waiver by Harris of his right to rely on "record" omissions. The question is whether Harris's case is more like that presented by *Williams* or by *Farmer*. If more like the former case, then federal collateral review is proper with respect to all omissions raised in the amended post-conviction petition also raised in the pending petition for habeas corpus.

In *Williams*, the Illinois Appellate Court "note[d] at the outset [that] the State is correct in its argument [that] the defense counsel waived [this issue] by failing to object to the trial court's [ruling]." *People v. Ross*, 63 Ill.App.3d 884, 20 Ill.Dec. 688, 692, 380 N.E.2d 897, 901 (1st Dist.1978). The Court followed this statement with citations to three Illinois Supreme Court cases supporting the state's waiver argument. *Id.* However, the Court never explicitly stated that the issue was waived. The Court then continued to reach the merits of the claim, finding that the improperly raised issue was substantively without merit. According to the Seventh Circuit in *Williams*, this treatment of what would otherwise be a waived claim allowed federal collateral review of that claim. *Williams*, 687 F.2d at 951.

In contrast, the *Farmer* Court, on appeal from denial of a post-conviction petition, explicitly found that the petitioner had waived his claim before examining the issue presented. *Farmer*, 721 F.2d at 605. Similarly, the Court in *Veal* distinguished an express ruling on procedural default from a mere discussion thereof for purposes of applying the *Sykes* bar to collateral review. *Veal*, 693 F.2d at 650. An express ruling on procedural default, presented as an independent and alternative ground for denying relief, prevents federal collateral review.

[10] The treatment of Harris's claim is strikingly similar to that involved in *Ross*. In the February 22, 1983 denial of Harris's post-conviction appeal, the Court simply noted that waiver appeared to operate, but then continued to treat the merits of the improperly raised issue. Both the *Harris* and the *Ross* courts did not appear to make two rulings in the alternative, but rather to note a procedural default and then ignore it, reaching the merits instead. The court is therefore persuaded that Harris's ineffective assistance of counsel claim may be presented to the federal court with respect to all omissions raised in the amended post-conviction petition.

B. Merits of Ineffective Assistance Claim

[11] The United States Supreme Court has recently issued two opinions concerning the scope of the sixth and fourteenth amendment right to effective assistance of counsel. *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronic*, — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The Court noted the universally accepted principle that the federal constitution guarantees "reasonable effective assistance." *Strickland*, 104 S.Ct. at 2062. A convicted defendant, to prevail on an ineffective assistance of counsel claim, must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 2065.

The *Strickland* Court stressed that "[c]ounsel ... has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," *id.*, and that "counsel's function ... is to make the adversarial testing process work in the particular case," *id.* at 2066. Reasonable professional judgments must support counsel's actions. If counsel did not conduct a complete investigation of a particular matter, a reasonable professional basis for not conducting that investigation will defeat an ineffective assistance claim. *Id.* at 2066.

In addition to demonstrating an unreasonable professional error by counsel, a defendant must also show that the error had an effect on the judgment:

> The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 2067. The court went on to describe the circumstances under which prejudice is presumed, *see id.* at 2607; *United States v. Cronic*, 104 S.Ct. at 2046–2047 & n. 25, and under which prejudice must be affirmatively shown by defendant, *Strickland*, 104 S.Ct. at 2067–68. Where defendant must demonstrate prejudice, as in this case, the test that must be satisfied is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." When a petitioner challenges his conviction, "the question is whether there is a reasonable probability that, absent the error, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 2069.

[12] Defendants challenging the constitutional sufficiency of their counsel must prove both parts of this test. Thus, the *Strickland* Court made clear that a finding that one part was not established obviates a decision regarding the other part. *Id.* A court may also review counsel's performance by addressing the prejudice component first, or vice versa. *Id.* When examining counsel's performance, "'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' that might be considered sound trial strategy." *Rogers v. Israel*, 746 F.2d 1288, 1294 (7th Cir.1984) (citing *Strickland*, 104 S.Ct. at 2065–66). *E.g., McKinney v. Israel*, 740 F.2d 491, 492 (7th Cir.1984) (court addressed only prejudice element and finding lack thereof, declined to reverse denial of writ); *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) (finding of incompetent counsel performance without resultant prejudice; court affirmed denial of writ).

[13] Regarding proper defense counsel preparation, the Seventh Circuit has explained:

> It is undisputed that a defense counsel "should make reasonable investigations into all defenses," *United States v. Zylstra*, 713 F.2d [1332] at 1338 [(7th Cir. 1983)], and that such investigations encompass the interviewing of witnesses. *United States v. Decoster*, 624 F.2d 196,

209 (D.C.Cir.1976) (en banc) (plurality opinion).

Arrowood v. Clusen, 732 F.2d 1364, 1370 (7th Cir.1984). In *Crisp v. Duckworth*, the Seventh Circuit examined extensively claims of ineffective assistance of counsel at the investigation and trial preparation stages, the stages implicated in the present petition. In that opinion, the Court stressed again the importance of pretrial investigation to reasonably competent representation:

> Effective representation hinges on adequate investigation and pre-trial preparation. *See United States ex rel. Spencer v. Warden, Pontiac Correctional Center*, 545 F.2d 21, 24–25 (7th Cir.1976) (as corrected) (mere appearance of in-court effectiveness cannot compensate for inadequate pre-trial preparation).... Investigation may help an attorney develop or even discover a defense, locate witnesses, or unveil impeachment evidence. Though there may be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation. [Citations omitted.]
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> • • • • • •
>
> We do not agree that police statements can generally serve as an adequate substitute for a personal interview. *See United States v. Tucker*, 716 F.2d [756] at 583 & n. 17 [(9th Cir.1983)]; *United States v. DeCoster*, 487 F.2d [1197] at 1204 [(D.C.Cir.1973)] ("a defense attorney ... should interview not only his own witnesses but also those that the government intends to call").

743 F.2d at 583–584. It is true that a defense attorney's discretion is broad, and that so-called "trial strategy" may excuse omissions that otherwise would appear inexcusable. However, the Seventh Circuit clearly recognized in *Crisp* that

> [t]hough there may be instances when the decision not to contact a potential defense witness is justified, [citation omitted], an attorney who fails even to interview a readily available witness whose noncumulative testimony may potentially aid the defense should not be allowed automatically to defend his omission simply by raising the shield of "trial strategy and tactics," [citation omitted]; *see also Davis v. Alabama*, 596 F.2d [1214] at 1217 [(5th Cir.1979)] ("An attorney does not provide effective assistance of counsel if he fails to investigate sources of evidence which may be helpful to the defense."); *United States v. DeCoster*, 487 F.2d at 1201 (A court should not "second guess strategic and tactical choices made by trial counsel. However, when counsel's choices are uninformed ... a defendant is denied the effective assistance of counsel.")

743 F.2d at 584.

[14] In this case, Harris claims that his counsel failed to interview and to call numerous witnesses. Some of the omissions could have led to impeachment, such as Slater's claim that he voluntarily appeared at the police department, that he did not hang around the crime scene area, and that there was a poolroom on Kedzie and 13th where he frequently saw Harris and knew him as "Wayne." In a case dependent solely on eye witness identification, where the identification is bolstered by the witness's prior knowledge of the defendant, this impeachment is important. Counsel's alleged failure to investigate certain witnesses could also amount to ineffective assistance of counsel. For example, Harris claims that his counsel did not interview Carter and Riles, who were present on the first day of trial. These two witnesses identified two men running from the scene of the crime. One of the men was McWhorter, according to both witnesses, and the other's identity is unclear. Riles told the police she could identify the other if shown his picture. Perhaps Riles and Carter could have identified Williams as the man running from the scene with McWhorter (Williams claims he was with McWhorter that night). This testimony could have been offered by the defense as an exculpatory version of the shooting. Finally, alibi witnesses, willing and available, were not called and the hospital records allegedly were not checked.

Taking Harris's allegations as true, his trial counsel's failure to conduct the above-described investigations would fall below the standard of reasonably competent representation. It is axiomatic that a defense counsel must interview witnesses to the crime and alibi witnesses. Trial counsel should also interview witnesses such as Riles and Carter, who did not witness the shooting but who observed areas near the crime scene at the time of the shooting. Finally, possible suspects, such as Williams, should be interviewed as possibly providing an alternative, exculpatory version of the events. (Such a version was alluded to by Kuhlen in Harris's opening statement.)

Respondent, the party moving for summary judgment, offers the October 14, 1983 affidavit of Todd Musberger as evidence of Musberger's competency. Musberger states that, "My best recollection is that Alice Riles and Leroy Carter were among the witnesses that could not be located. All police witnesses were interviewed before the trial and each cross examination was made with the most effective trial strategy in mind." (Respondent's Answer and Motion, filed 10/21/83, Musberger Affidavit.) However, the trial record indicates that Riles and Carter were in court on the day trial started, (Tr. 23), at least one because of Musberger's subpoena. This inconsistency, plus Musberger's failure to state explicitly whether he interviewed these two witnesses, prevent the court from determining on this motion that Musberger did investigate these witnesses and make an informed judgment regarding use of their testimony at trial.

Regarding the alibi witnesses, Musberger states:

> On two occasions that I presently recall, I interviewed Jewel Connor, Mary Connor and Genise Connor. I recall interviewing Thomas Charles on one occasion. It was my considered opinion that the jury would not find these people credible. Therefore I decided as a matter of trial strategy not to call any of these people as witnesses at Mr. Harris's trial.

(*Id.*) Musberger does not indicate whether he checked the Cook County Hospital records in an attempt to corroborate this story.

In the affidavits of the alibi witnesses, Z. Mary Connor and Genise Connor state that they were available to testify and were not called, but do not mention whether Musberger interviewed them. Jewel Connor's affidavit indicates that she twice contacted Musberger in an attempt to explain her story to him. Musberger's affidavit is thus technically consistent with these alibi witness affidavits, although Musberger provides no reason for his conclusion that the witnesses were not credible.

Musberger states that he interviewed all police witnesses. As Harris does not claim that Musberger did not interview McWhorter, the court will assume that McWhorter was interviewed. Musberger does not expressly state that he interviewed Williams, who could have testified that Harris was not at the scene of the shooting.

Musberger does not respond to Harris's claims concerning impeachment evidence. While Musberger may not have been allowed to present extrinsic impeachment evidence, reasonably competent counsel should investigate possible avenues of impeachment. The evidence that Slater could not have known Harris through frequent contacts at a poolroom which allegedly did not exist is such an apparent avenue of impeachment.

[15] This discussion reveals that one part of the ineffective assistance of counsel test—that pertaining to reasonably competent professional representation—cannot be decided on this motion. Musberger's affidavit is too general to answer all of Harris's claims. The court may deny a claim of ineffective assistance, however, if the prejudice component is not satisfied. Should Harris's allegations be true, however, he may have satisfied the prejudice

test. On this record and with Musberger's conclusory affidavit, the court cannot make a finding that the alibi witnesses were not credible. Moreover, impeachment of Slater additional to that accomplished at trial would cast further doubt on the reliability of the verdict. This is especially true regarding the nonexistence of a poolroom at 13th and Kedzie, which would impeach Slater's credibility as well as his identification. Finally, the alternative possible version of events, that Williams or McWhorter may have been responsible for the shooting, also casts further doubt on the verdict. Hence, both the competence of counsel's representation and the possible prejudice resulting therefrom should be examined in an evidentiary hearing. Such a hearing is appropriate when facts are in dispute and petitioner was not afforded a full and fair hearing on the ineffective assistance issue in the state system. *Townsend v. Sain*, 372 U.S. 293, 312–13, 83 S.Ct. 745, 756–57, 9 L.Ed.2d 770 (1963).

Respondent's motion for summary judgment as to ineffective assistance of counsel is denied. An evidentiary hearing on this claim will be set. Harris will be appointed counsel to aid him in this hearing. Rules Governing § 2254 Cases, 28 U.S.C. fol. § 2254, Rule 8(c).

III. Newly Discovered Evidence

Harris's third claim is that his custody violates the federal constitution, as newly discovered evidence demonstrates he is innocent of the charged crime. In Harris's original post-conviction petition, which Abrahams states she filed on July 17, 1979, Harris requested a new trial based on newly discovered evidence and on ineffective assistance of counsel. Paragraphs 1 through 6 contain the allegations of newly discovered evidence, namely, the affidavit testimony of Melvin McWhorter. This affidavit reads in part:

> I was acquainted with Pete Earnest Howard befor [sic] he was killed and have on occasion, purchased narcotics from him.
>
> On July 9, 1977, at about 10:00 PM., I was present in the fifteen-hundred block of South Christiana Avenue and consequently, witnessed the shooting of Mr. Howard. He was shot by George Williams, whom I have known for over twelve (12) years.
>
> I am also acquainted with Antonio Slater.... On July 9, 1977, Antonio Slater was not present in the fifteen-hundred block of South Christiana at 10:00 oclock [sic] pm. the night Pete Earnest Howard was killed.

(McWhorter Aff., dated June 29, 1979.) Harris alleges in his original post-conviction petition that this evidence was not and could not have been discovered by him or his counsel at an earlier date.

The amended post-conviction petition, however, omits the claim of newly discovered evidence. Rather, the entire claim rests on the allegation of ineffective assistance of counsel. No mention is made of the McWhorter affidavit, although it was incorporated as an exhibit to the amended petition. (Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 1–6 [Transcript].) At the March 19, 1979 hearing, Harris's attorney Hardiman did not mention the McWhorter evidence.

As discussed above, the lower post-conviction court found that Harris had been provided effective assistance of counsel. It did not mention newly discovered evidence. On appeal of the postconviction petition, it is clear that ineffective assistance was also the only issue presented. (*See* Motion of Exceptions, filed 8/20/82, Exhibit [Brief and Argument for Petitioner-Appellant].) The Appellate Court clearly reached only the ineffective assistance argument. Although it noted the McWhorter affidavit on page 3, the Court failed to mention it again in the opinion.

[16, 17] In Illinois, in order to obtain a new trial based on newly discovered evidence, a defendant must show that the evidence could not have been produced at trial by use of reasonable diligence, that the evidence is noncumulative, and that the evidence is of such a conclusive character that it would probably change the result. *People v. Sullivan*, 95 Ill.App.3d 571, 51 Ill.Dec. 60, 420 N.E.2d 474 (1st Dist.1981). Motions for new trial are subject to close scrutiny, *People v. Carpenter*, 74 Ill. App.3d 770, 80 Ill.Dec. 395, 393 N.E.2d 50 (1st Dist.1979), and have been frequently characterized as "disfavored," *e.g.*, *People v. Wolf*, 48 Ill.App.3d 786, 6 Ill.Dec. 720, 863 N.E.2d 402 (2d Dist.1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1469, 55 L.Ed.2d 506 (1978); *cf. United States v. Feldman*, 756 F.2d 556, 560 (7th Cir.1983).

[18, 19] Newly discovered evidence must be presented to the trial court in a motion for new trial. Motions for new trial are governed by Ill.Rev.Stat. ch. 38, ¶ 116–1, which provides that they must be brought "within 30 days following the entry of a finding or the return of a verdict." *Id.* at ¶ 116–1(b). Exceptions to this 30-day requirement are narrow. *People v. Ferguson*, 102 Ill.App.3d 702, 57 Ill.Dec. 958, 429 N.E.2d 1321 (1st Dist.1981), *cert. denied*, 459 U.S. 872, 103 S.Ct. 159, 74 L.Ed.2d 133 (1982) (where sole prosecution witness recants or where prosecution prevented defendant from discovering evidence). Harris has not alleged compliance with these procedures. Moreover, Harris does not claim that these procedures themselves violate his federal due process rights. *Cf. Griswold v. Greer*, 712 F.2d 1200, 1205 (7th Cir.1983).

A. Waiver

[20] The court will assume that Harris filed a timely motion for new trial based on newly discovered evidence. However, unlike the ineffective assistance of counsel argument, the newly discovered evidence argument was not presented to nor considered by the reviewing Illinois courts. As described above, Harris omitted to make this claim before both the post-conviction and the direct appeal lower and appellate courts. Hence, this court is barred from considering the merits of the claim. *Wainwright v. Sykes, supra.* Harris has advanced no explanation for this procedural default.

B. Merits of Newly Discovered Evidence Claim

[21] Were the court to consider this issue, review would be narrow. In a federal habeas action, courts review the state proceedings for violations of federal constitutional rights. 28 U.S.C. § 2254(a). Hence, a federal court will not review the merits of a state court's denial of a new trial motion solely under the state standards for the granting of a new trial. *United States ex rel. Guillen v. DeRobertis*, 580 F.Supp. 1551, 1556 (N.D.Ill.1984).

[22] The scope of federal habeas corpus review concerning newly discovered evidence is described in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In that case, the Court explained:

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

Id. at 317, 83 S.Ct. at 759. This reason has led courts to the principle that a denial of a motion for new trial based on newly discovered evidence may be reviewed only for the presence of an error of constitutional magnitude. *Subilosky v. Callahan*, 689 F.2d 7, 9 (1st Cir.1982), *cert. denied*, 460 U.S. 1090, 103 S.Ct. 1788, 76 L.Ed.2d 356 (1983); *Guillen*, 580 F.Supp. at 1556. The Fifth Circuit has explained this test as follows:

> Questions of guilt or innocence are not matters to be considered upon petition for habeas corpus. ... Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not to its legality ... [T]he confession 'might be urged as a proper subject for executive clemen-